In the Supreme Court of the United States.

UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM A. CLARK, APPELLEE.
No. 359.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

This case is here on an appeal from the Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the United States Circuit Court for the District of Montana, dismissing complainant's bill, praying that certain patents, 80 in number, under which the defendant, William A. Clark, claims title to certain timber lands in Montana, be set aside because of alleged frauds committed by the patentees in procuring the same.

The patentees obtained these patents under the timber and stone act (20 Stat. L., 89, as amended, 27 Stat. L., 348; U. S. Comp. Stat., 1901, p. 1545).

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Before patents issued, but after the entrymen and entrywomen made final proofs and obtained final receipts, they conveyed to one Robert M. Cobban, and Cobban conveyed to the defendant Clark. Clark only, at the time the Government commenced this suit, claimed title to the lands.

By the terms of the act a person desiring to obtain 160 acres or less of non-mineral, non-agricultural land at $2.50 per acre must file statement in the local land office, verified by applicant's oath, that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and must further swear that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever by which the title he might acquire from the United States should inure in whole or in part to the benefit of any person except himself. He shall, if he swears falsely, be subject not only to all the pains and penalties of perjury, but shall forfeit the money he pays for said land, and all right and title to the same, *and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.*

A brief synopsis of the material allegations of the bill, on which the prayer for cancellation of said patents is based, is here given:

Said Cobban determined to obtain the lands described, and this could only be accomplished by inducing men and women to enter them in express violation of said act. He made a contract in writing

with C. L. Griswold, May 22, 1899, to aid him, and also hired one John B. Catlin, and the three hired persons of both sexes to locate upon unappropriated public lands on which valuable timber was growing, agreeing to pay each person $100 for the land, also the land office fees together with all expenses of themselves and their witnesses.

The names of entrymen and entrywomen and the parcels of land entered are set forth in detail in the bill of complaint, and the charge is specifically made that in each and every case said written statement was false and fraudulent in that each one so entering did purchase for speculation and did make prior agreements to sell to another. The bill further charges that in pursuance of such prior agreements and speculative purposes the entrymen and women did all of the acts required for the acquisition of titles; that their final proofs were false and fraudulent, and thereby the officers of the local land offices were induced to deliver to them final receipts; that each one of said entrymen and entrywomen at once thereafter executed and delivered a deed for said lands, respectively, to Cobban, who in turn, shortly thereafter, executed warranty deeds to the defendant, except four, who sold their timber but retained the land; that defendant, William A. Clark, well knew in a general way if not in detail, at the time the said conveyances were made to him by Cobban, the above facts, and well knew and had good cause to know that said lands had been entered in violation of the law, and that the said entries had been

made for hire and upon speculation and for the purpose of enabling him to obtain title illegally.

The bill prays that the several patents be canceled; the pretended titles be voided; that defendant shall release the same to the United States; that he account to the United States for all timber or stone cut, quarried, or removed since entry; that he be restrained by injunctions from cutting or removing timber or lumber, or quarrying or removing stone during the pendency of the suit, and restrained from encumbering or otherwise disposing of said lands during the pendency of said suit. A prayer for general relief was added.

The defendant answered denying all the material allegations of the bill, and affirmatively averred that he was and is an innocent purchaser of said lands, for a valuable consideration, and without notice.

To this answer replication was filed, the case was referred to Henry M. Blake, examiner, proofs were taken and duly filed. No findings or conclusions were made by the examiner. No witnesses appeared in person before the court; no rulings of the court relative to the competency of the evidence offered by either party appear in the record, and no findings of fact or conclusions of law were made by the Circuit Court.

The case was submitted on the pleadings and proofs. After due consideration, the Circuit Court (Judge Knowles) decreed that the bill should be dismissed,

filing a written opinion, which appears in 125 Fed. Rep., 774.

The United States appealed to the Circuit Court of Appeals for the Ninth Circuit; argument was had before said court, which resulted in said court affirming the decree of the Circuit Court by a majority decision. (138 Fed. Rep., 294.) Judge Gilbert dissenting.

From said decree, the complainant appealed to this court.

CONCERNING THE RECORD.

Appellant regrets the exceedingly voluminous record brought to this court. In explanation it may be said that 80 cases as to facts, in most respects absolutely distinct, though in law practically alike, are comprised within the one. Necessarily much documentary evidence appertains to so many land entries, deeds, and records of same. Moreover, this record shows that nearly all the entrymen and women were made witnesses for appellant and were plainly hostile, being under indictment for perjury in connection with their entries. The probing process in taking testimony is seldom brief, if effective, but in addition to the above facts a most unfortunate condition is made apparent, which it is deemed proper to mention herein. Illustrating this condition we give a table of statistics gathered from the record.

COMPLAINANT'S CASE.

	Direct and redirect.		Cross and recross.	
	Pages.	Objections.	Pages.	Objections.
Volume I	319	559	209	3
Volume II	331	434	193	54
Volume III	448	573	79	5
Volume IV	429	584	98	8
Volume V	446	422	81	13
Volume VI	438	818	89	14
Volume VII	278	605	231	80
Total	2,692	3,995	980	177

DEFENDANT'S CASE.

Volume II	4	3	14	4
Volume III	11	4	38	107
Volume VII	15	14	0	0
Volume VIII	152	47	375	243
Volume IX	167	78	360	374
Volume X	131	69	396	318
Volume XI	27	6	500	464
Volume XII	39	46	218	123
Total	546	267	1,901	1,633

COMPLAINANT'S CASE IN REBUTTAL.

Volume XII	62	144	40	19
Volume XIII	375	558	35	29
Total	437	702	75	48

We believe this record is unnecessarily voluminous, and that it is not the fault of complainant's counsel. Even a casual glance through the pages of the different volumes containing complainant's original case will demonstrate this fact. In making that case, objections, interruptions, and arguments before an officer who had no authority to decide any question concerning the admissibility of testimony, and these in many instances remarkably extended, serve to indicate unusual zeal upon the part of defendant's counsel at the expense of time and space and the patience of a court. Proper objections can never be complained of, but where counsel's privilege of objection is carried to such an

extent as is here manifest, and is exercised in such manner as to retard rather than secure the ends of justice, even in an appellate court, we think it is proper to receive the attention of opposing counsel.

ASSIGNMENT OF ERRORS.

We rely on the following assignments:

I.

The decree is erroneous because the court erred in holding and deciding that the defendant was a bona fide purchaser of the lands described in the patents sought to be canceled.

III.

The decree is erroneous because the court holds and decides that, notwithstanding said entrymen and entrywomen might have been guilty of frauds and perjury in the acquisition of their receipts and patents, the simple fact that, in ignorance thereof, the officers of the Land Department issued and delivered to them patents was enough to make the defendant, who had completed his purchases before patents issued, a bona fide purchaser in case he did not have knowledge of said frauds.

IX.

The decree is erroneous because the court erred in not finding that the fact is conclusively established by the evidence that Thomas Pelkey did apply to purchase the lands named and described in the patent issued to him by the United States, and now sought

by the bill to be canceled, on speculation, and that he did not in good faith purchase the same to appropriate it to his own exclusive use and benefit. Likewise, in not finding the fact completely established by the evidence that said Thomas Pelkey had made a prior contract or agreement, by which the title which he might acquire from the Government of the United States should inure to the benefit of one R. M. Cobban, and that, in pursuance of such prior agreement, soon after receiver's receipt was issued, said Thomas Pelkey did execute and deliver a deed to said Cobban of said lands, and in not, for said reasons, decreeing the cancellation of said patent.

NOTE.—Appellant relies on Assignment X, but does not repeat same here because it merely brings each entry man and woman within the scope of Assignment IX.

XII.

The decree is erroneous because the court erred in not finding that the fact is established by the evidence that said agreement was fully executed, and that by reason thereof said Cobban did obtain deeds from said entrymen and entrywomen, and thereby obtained such title to the lands named and described therein as said entrymen and entrywomen had thereto, which lands he, said Cobban, before the issuing of patents, sold to the defendant, which lands are named and described in the patents which issued to the entrymen subsequent to defendant's purchase from Cobban, and which are now sought to be cancelled.

XIII.

The decree is erroneous because the court erred in not finding that the fact is established by the evidence that said Cobban, in so fraudulently and illegally acquiring title to said lands, did act for the use and benefit of the defendant herein.

XIV.

The decree is erroneous because the court erred in not finding that the fact is established by the evidence that one A. H. Wethey was, at the time that these lands were being so illegally acquired by Cobban, the general manager and agent of the defendant at Butte, Mont., and that the deeds to said lands were delivered to said Wethey as such agent, and that he knew, or by the exercise of ordinary prudence could have known, prior to his purchasing said lands from Cobban, of the fraudulent transactions and agreements which resulted in said Cobban obtaining such title as he had in and to such lands.

XV.

The decree is erroneous because the court erred in not finding that the fact is conclusively established from the evidence that McLaughlin, the duly authorized timber agent of the defendant, had personal knowledge of the method adopted by Cobban to acquire title to the lands which he sold to the defendant.

XVI.

The decree is erroneous because the court erred in not finding that the fact is established by the evidence that the said defendant, William A. Clark, well knew, in a general way if not in detail, at the time the said conveyances of all of said lands were made to him by said Cobban, that the said lands had been entered in violation of the laws of Congress under which said entries had been made.

XVII.

The decree is erroneous because the court refused to hold that the records disclosing the fact to the defendant and his attorneys, that the title to the lands which he was about to purchase from Cobban being still in the United States, he could not obtain the legal title thereto; and he was thereby put upon his inquiry as to the true state of the title, and bought the lands at his peril, knowing that he could only buy what his vendor had to sell, and that he could take no better title than his vendor's. In short, in not applying the rule of *caveat emptor*.

XIX.

The decree is erroneous because the court erred in holding and deciding that the patents, when issued, converted the equitable title evidenced by the receiver's receipt, into a full legal title, because the fact is completely established from the evidence in the case that said entrymen never did acquire equitable titles to the land, as their titles were based on fraud and perjury.

XX.

For the foregoing reasons the court erred in dismissing the bill of complaint, and in not entering a decree for complainant.

ARGUMENT.

This long record presents but two, or at the most three, questions for decision:

(1) Did the entrymen secure their patents in violation of the terms of the timber and stone act?

(2) Is it possible, under any circumstances, for a man who buys before patent has issued to be a bona fide purchaser?

(3) If so, was Clark an innocent purchaser?

We shall consider these questions in the above order.

Appellant, mindful of the rule in the *Maxwell Land Grant case* (91 U. S., 325), requiring certainty of proof to avoid patents, claims that it has established by competent evidence that each of the patents sought to be cancelled was illegally acquired from the United States.

In the interest of abbreviating and simplifying the labors of the court, we have carefully prepared a tabulated abstract of the most important features of the testimony in the case respecting the original fraud, which serves to reduce to a very brief space the substance of all these thousands of pages contained in the record, and we herewith insert and submit the same in a distinct sheet, because it can not easily be printed in the brief proper. It will be seen that the first column contains the name and occupation of each entryman and

entrywoman. The second, gives dates of receiver's receipts in their respective cases; the third, the dates of their respective deeds to Cobban; fourth, the amount received by them for their services; fifth, by whom purchase price of lands and expenses were paid; sixth, by whom they were located on the land; seventh, their witnesses; eighth, date of Cobban's deed to Clark; and the ninth, the pages of the record where their testimony may be found.

Appellant claims that it has established the frauds charged, even to the degree of certainty required in criminal cases.

The proofs show that Cobban and Griswold, and others employed by them, hired men and women to enter timber claims which he, Cobban, had ascertained had sufficient timber to justify him in paying the Government price of $400, the cruising of the land, the payment of all expenses of the entrymen, and for their time and trouble in making their entries and final proofs the sum, in round numbers, of $100.

They show that, within less than a year after the making of said contract, Cobban did obtain about 16,000 acres of valuable timber lands from entrymen and entrywomen, some of whom are named in the bill. That said entrymen, with one or two exceptions, were in humble, even indigent, circumstances.

It is further shown that they were all taken to the land situated in dense forests, on a steep mountain side, by Cobban, Griswold, or one of their employees. That the great majority of said entrymen,

Schedule.

Names of entry men and entry women, age, and occupation.	Date of receiver's receipt.	Date of deed to Cobban.	Amount received as admitted, or claimed by Government.	By whom purchase price and all expenses furnished.	By whom located.	Witnesses.	Date of Cobban's deed to Clark.	Pages of record of entry men's testimony.
John Gillis, 40, cook (see p. 2511)	Aug. 1, 1899	Aug. 1, 1899	$100 and expenses	R. M. Cobban	C. L. Griswold		Sept. 16, 1899	Dead.
Charles Cloutier, "lumber jack"	do	do	$250	do	do		do	Whereabouts unknown.
Charles H. Moss, 32, peddler	Sept. 29, 1899	Oct. 13, 1899	$100 and expenses	do	Jemison	Griswold	Nov. 13, 1899	1081–1097.
Charles H. Jemison, 26, saloon	Nov. 6, 1899	Nov. 6, 1899	do	do	do	E. R. Kilburn	Nov. 11, 1899	1126–1132.
Frank B. Arey, 42, carpenter	Oct. 27, 1899	Oct. 27, 1899	do	do	Griswold		do	1134–1140.
Lelia T. Bryan, 25, teacher	Sept. 14, 1899	Sept. 22, 1899	do	do	Thos. Bryan		Nov. 13, 1899	1142–1149.
John L. Deering, laborer	Oct. 20, 1899	Nov. 6, 1899	do	do	Griswold		Nov. 11, 1899	Whereabouts unknown.
Herbert Eddy, homestead filing	Oct. 27, 1899	Oct. 27, 1899	do	do	Jemison, Griswold's agent		do	1190–1225.
Mary Eddy, wife, 30	do	do	do	do	Jemison	Albert Jemison	do	1228–1240.
Abraham J. Jemison, 39, homestead claim	Nov. 6, 1899	Nov. 6, 1899	do	do	do		do	1241–1272.
Zora Jemison, 40, wife	do	do	do	do	do	Albert Jemison	do	1272–1286.
James W. Wheaton, carpenter	Oct. 27, 1899	Oct. 27, 1899	do	do	do	do	do	1288–1307.
Jacob F. Jemison, 72, father of Albert	Sept. 22, 1899	Sept. 22, 1899	do	do	do	Griswold and Jemison	Jan. 26, 1900	1150–1157.
Eveline Jemison, wife, 65	Oct. 7, 1899	Oct. 7, 1899	do	R. M. Cobban	Albert Jemison	Griswold		1308–1325.
Harriet Bryan, wife of Thomas, laborer	Sept. 4, 1899	Sept. 4, 1899	do	do	Thos. Bryan		Sept. 16, 1899	1330–1358.
Belle Bryan Gilles, 24	Sept. 14, 1899	Sept. 16, 1899	do	do	do	Griswold	do	Sick and unable to attend.
John Saleen, laborer	Oct. 24, 1899	Oct. 25, 1899	do	do	Jemison	Marion Watson	Nov. 11, 1899	Whereabouts unknown.
Cora Dodd, wife, sister of Marion Watson	Oct. 10, 1899	Oct. 10, 1899	do	do	Griswold	do	Nov. 13, 1899	1362–1394.
Hiram Dodd, 70, no occupation, indigent circumstances	Oct. 19, 1899	Oct. 19, 1899	do	do	do	do	do	1431–1451.
Matilda Dodd, wife	do	do	do	do	do	Griswold	do	Sick and unable to attend.
Harrison Dodd, laborer	do	do	do	R. M. Cobban	do	Jemison and Kilburn	do	Out of the State.
Lizzie Dodd, wife	do	do	do	do	do	do	do	Do.
Joshua C. Gilman	Sept. 29, 1899	Sept. 29, 1899	do	R. M. Cobban	Jemison	Albert Jemison	Nov. 11, 1899	1531–1545.
Lavinia I. Gilman, wife, sister of A. J	do	do	do	do	do	Geo. P. Jemison	do	1510–1530.
Thomas Roll, 47, small ranch	Oct. 27, 1899	Oct. 27, 1899	do	do	do		Sept. 16, 1899	1548–1563.
Laura Roll, wife, sister of A. J	Oct. 7, 1899	Oct. 7, 1899	do	do	do	Griswold and Jemison	Nov. 11, 1899	1456–1508.
Leonard Barrett, 65, indigent circumstances	Sept. 14, 1899	Sept. 18, 1899	do	do	Griswold	Griswold and Catlin	Nov. 13, 1899	1566–1587.
Edward D. Doney, 60, small ranch	Aug. 14, 1899	Aug. 17, 1899	Credit at J. & F. Store	R. M. Cobban, per J. & F.	Jemison and Faust	Faust	Sept. 16, 1899	1588–1641.
Martha M. J. Doney, wife	do	do	do	do	do	do	do	6220–6230.
George Dildine, contractor, 45	Oct. 21, 1899	Oct. 23, 1899	$100 and expenses	R. M. Cobban	Jemison	Griswold and Jemison	Nov. 11, 1899	1643–1673.
Emma Dildine, wife, sister of A. J	Oct. 7, 1899	Oct. 7, 1899	Lots	do	do	do	do	1869–1923.
Daisy Chattin, wife	Oct. 20, 1899	Oct. 20, 1899	$100 and expenses	do			do	6203–6212.
B. Frank Chattin, 28, teamster, etc	Aug. 15, 1899	Aug. 23, 1899	do	do		Griswold	Sept. 16, 1899	1735–1762.
William J. Eddy, 34, homestead claim	Sept. 29, 1899	Sept. 29, 1899	do	do	Jemison	do	Nov. 11, 1899	1768–1785.
George P. Jemison, 28, homestead claim	do	do	do	do	do	Albert Jemison	do	1837–1863.
Recy M. Jemison, wife, 28	do	do	do	do	do	do	do	2864–3000.
Thomas H. McConnell, rented farm	Oct. 12, 1899	Oct. 20, 1899	do	do	Griswold	Griswold	Nov. 13, 1899	1935–1959.
Calvin Yarger, 58, homestead claim	Oct. 27, 1899	Oct. 30, 1899	do	do	Jemison		Nov. 11, 1899	1966–2006.
Sarah Yarger, wife	Oct. 7, 1899	Oct. 7–21, 1899	do	do	do	Griswold and Jemison	do	Out of the State.
John G. Hendryx, 35, rented farm	Nov. 10, 1899	Nov. 10, 1899	do	do		do	do	2015–2070.
Levi B. Cyr, 33, teamster	Dec. 18, 1899	Dec. 22, 1899	do	do			Jan. 9, 1900	2074–2132.
Vital Cyr, laborer	do	do	do	do			do	2618–2668.
Oscar Muckenheim, 35, homestead claim	Aug. 12, 1899	Aug. 12, 1899	$290 and expenses	do		Griswold and Cobban	Sept. 16, 1899	2133–2162.
Martha E. West (nee Wright), 49, dressmaker	Nov. 10, 1899	Nov. 10, 1899	$100 and expenses	do		Griswold and Catlin	Nov. 13, 1899	2156–2179.
John B. Catlin, 65, agent Cobban	Sept. 14, 1899	Sept. 18–27, 1899	do	do	Jemison	Griswold	Sept. 16, 1899	4693–4880.
Lizzie T. Catlin, wife, 59	Nov. 10, 1899	Nov. 10, 1899	do	do	do	Griswold and Catlin	Nov. 13, 1899	2191–2202.
Effie M. Kilbourn, wife, agent of Cobban	Dec. 15, 1899	Dec. 15, 1899	do	do	Kilburn	Griswold and Kilburn	Jan. 2, 1900	2208–2224.
Matthew P. Dunham, 50, guide	Oct. 27, 1899	Oct. 27, 1899	do	R. M. Cobban		Tepper	Nov. 11, 1900	2259–2302.
Nels O. Opsata, 47, rancher	Sept. 6, 1899	Sept. 9, 1899	Credit at store	do				2303–2357.
Robert Starkie, 33, laborer (Record, page 3439)	Nov. 25, 1899	Nov. 25, 1899	$100 and expenses	do	Jemison		Jan. 9, 1900	2002–3087.
Mary A. Starkie, wife, 32 (Record, page 3439)	do	do	do	do	do	Griswold and Jemison	do	3092–3119.
John B. Reeve, 59 (Record, page 3439)	do	do	do	do	do	Jemison and Kilburn	do	3145–3264.
Eliza B. Reeve, wife, 59 (Record, p. 3439)	Oct. 25, 1899	Oct. 25, 1899	do	do	do		do	3121–3138.
Albert E. Ehle (Record, p. 3439)	Nov. 25, 1899	Nov. 25, 1899	do	do	do		do	2834–2849.
Mary J. Ehle, wife (Record, p. 3439)	Mar. 8, 1900	Mar. 14, 1900	do	do	do		June 15, 1900	2853–2907.
Alfred Stewart, homestead (Record, p. 3439)	Sept. 6, 1899	Sep. 9, 1899		do		Griswold and Jakway	Nov. 13, 1899	3341–3406.
Marion B. Watson, 37, agent of Griswold	Sept. 28, 1899	Oct. 10, 1899	100 and expenses	do	Watson	Griswold	do	5010–5091.
Katie Watson, wife	do	Sept. 28, 1899	do	do	Marion Watson	do	do	Sick.
Harriet Watson	do	do	do	do	do	do	do	
Dock E. Watson, indigent circumstances	Oct. 1, 1899	Oct. 10–20, 1899	do	do	do	do	do	
Dan McGillis, 36, day laborer	Nov. 7, 1899	Nov. 7, 1899	do	do		Tepper	Nov. 11, 1899	6106–6176.
James Mize, 53, laborer, 10 children	Nov. 6, 1899	Nov. 6, 1899	do	R. M. Cobban, per J. & F.	Jemison	Albert Jemison	do	1172–1186.
Jennie Mize, wife, 52	do	do	Witness doesn't know	do	do	do	do	6188–6200.
May Hawthorne, sister of Jackway	Sept. 16, 1899	Sept. 20, 1899	J. & F. account	do	Jemison and Faust	Griswold and Jakway	Nov. 13, 1899	6240–6262.
Oliver E. Muchmore, 34, laborer	Sept. 1, 1899	Sept. 8, 1899	$100 and expenses	do	do		Sept. 16, 1899	888–903
Elizabeth E. Muchmore, wife, 27	do	do	do	do	do	Griswold and Jakway	do	6212–6219
Albert F. Muchmore, 26, farm hand	do	Sept. 9, 1899	do	do	do	do	do	996–1014
Guy W. Muchmore, 23	do	do	do	do	do	do	do	1159–1169
Elijah W. Hoyt, rancher	Aug. 31, 1899	do	do	R. M. Cobban	do	do	do	1100–1164
Charlotte T. Hoyt, wife	do	do	do	do	do	do	do	
Albert Jemison (acting for Griswold), saloon, etc	Sept. 22, 1899	Sept. 22, 1899	do	do	Jemison	Griswold	Nov. 11, 1899	360–599–p.–6604
John Murtaugh, 40, "lumber jack"	Dec. 4, 1899	Dec. 5, 1899	do	do	do	Albert Jemison	Jan. 9, 1900	831–862–6595
Edgar Lehman, laborer	Sept. 14, 1899	Sept. 16–18, 1899	$125 and expenses	do	Griswold	Griswold	Nov. 13, 1899	
Matilda Eddy, wife of William	Oct. 27, 1899	Oct. 30, 1899	$100 and expenses	do	Jemison	Tepper	Nov. 11, 1899	
Charles B. Sperry, rancher	Oct. 12, 1899	Oct. 20, 1899	do	do	Griswold	Griswold	Nov. 13, 1899	865–882.
Thomas Pelkey, laborer	Aug. 15, 1899	Aug. 16, 1899					Sept. 16, 1899	
John H. Hardy, Cobban's father-in-law	Nov. 10, 1899	Nov. 11, 1899		R. M. Cobban	Jemison	Cobban and Jemison	Nov. 11, 1899	
Elvira M. Hardy, Cobban's mother-in-law	do	do		do	do	do	do	
Stephen Tepper, laborer		Sept. 2, 1899	$100 and expenses	do		Griswold	Sept. 16, 1899	
Clara Belle Mickels, wife	Sept. 9 1899	Sept. 9, 1899	do	do		do	Nov. 11, 1899	
Arnold Mickels, laborer	do	do	do	do		do	Sept. 16, 1899	
Charles C. Snyder, laborer	Oct. 20, 1899	Oct. 20, 1899	do	do		Tepper	Nov. 13, 1899	

previous to their being taken to said lands, had never seen them before, were on said lands but a few hours, and never saw them thereafter.

It is further shown that they were then either taken or sent to Cobban's office in Missoula, Mont., where, free of charge to them, the original statement was filled out with data which had been furnished by Cobban's agents, then taken to the local land office in Missoula or Helena, 125 miles distant, by Cobban and his agents, who paid all of their traveling expenses, including railroad tickets, street-car fares, and hotel bills. That Cobban engineered and managed the business from the beginning to the end. He or his agents examined the publications required by law, corrected the same where necessary, and paid for them. He named the entryman's witnesses, and when the day for making final proof came, he, by his agents, paid the money into the land office and obtained the possession of the receiver's final receipts.

The proofs also show that at once, or within a very few days, said entrymen and entrywomen, by reason of prior agreement, went to Cobban's office and sold the land to him, and received from him $100 in money, plus any small incidental expenses they might have defrayed with their own money, as stage or railroad fare.

Also that it is a conceded fact that no one of said entrymen or entrywomen ever gave Cobban a mortgage or any security whatever (Rec., p. 5372), and while an attempt is made by the defense to show that

in one or two cases said entrymen went through the form of giving a promissory note, the attempt is an absolute failure, and the fact is none of them gave notes.

In a number of cases deeds were prepared in Cobban's office prior to final proofs, and Cobban's agents had them in possession at the time proofs were made, and at once thereafter said agents took the entrymen to notaries public and had them signed and acknowledged. (Rec., 6231–6238.)

Appellant claims that each of the entrymen and entrywomen in said statements violated the provisions of the act, in making oath that they did not apply to purchase the land on speculation, but in good faith to appropriate it to their own exclusive use and benefit, and that they had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which they might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except themselves.

True, they deny the legal conclusions that they made false affidavits, but they admit the above facts, which permit of no other conclusion than speculation.

All of said entrymen and entrywomen whose testimony appears in the record were, at the time testimony was taken, under indictment for perjury, and therefore hostile witnesses to the Government.

The testimony of 57 entrymen and entrywomen is found in the record, in volume and page as set forth in the last column of the table.

It was practically impossible for the Government to secure the attendance of the others.

GRISWOLD'S TESTIMONY.

In addition to this the Government produced the testimony of Cobban's principal agent, C. L. Griswold, who, because of their falling out when they came to settle, turned State's evidence.

By Griswold's testimony (Rec., Vol. I, p. 5–356; Vol. VII, p. 3416; Vol. XIII, p. 6429, etc.), the whole fraudulent scheme is revealed.

He is, in law, a competent witness, and if corroborated, his testimony should be credited. He is corroborated:

(1) By a written contract. (Exhibit A, Vol. Pleadings and Index, p. 216; also see p. 142.)

(2) By the testimony of Albert Jemison, another agent of Cobban, who was also an entryman. (Record, Vol. I, p. 360; Vol. II, p. 599; Vol. XIII, p. 6604.)

(3) By all the facts and circumstances of the case.

As appellant, for said purpose, attaches the greatest importance to said contract, it produces a copy of it here:

"This agreement made and entered into this 22d day of May, 1899, by and between R. M. Cobban, of Missoula, Montana, the party of the first part, and C. L. Griswold of Clearwater, Deer Lodge County, Montana, the party of the second part, witnesseth:

"That the said party is desirous of *acquiring title* to good timber lands in Missoula or Deer Lodge County, Montana. And whereas, the said party from his location and acquaintance with the country is in position

to acquire it for said first party. Therefore this agreement. Said second party agrees to work to the best of his ability in securing options on any desirable timber land that can be purchased at a reasonable figure.

"Second *to find locations* of timber on surveyed lands which are open for location under the *timber and stone act* and that will justify the location thereof at the present time; that to find good bodies of timber outside of the timber reserve and in a location that will justify the expenditure of eight hundred dollars for scrip with which to purchase the same. And in all cases to turn the same over to the said R. M. Cobban. And said first party agrees to and with the said second party that he will so far as possible *examine the various selections made by said second party.* And that so far as possible he will *purchase* the said lands when the price is satisfactory.

"Second, will, where he is satisfied with the amount and quality of land subject to location, *send parties to locate the same.* And further to pay to the said C. L. Griswold on each claim hereafter purchased or any option hereafter acquired by said second party the sum of five cents per thousand feet or fifty dollars for each million feet of saw timber, as usually estimated in the State of Montana. And the same amount for each location made on lands *selected* by said *second* party *but filed on by parties whom first party may furnish.* Or the same amount to be paid to second party on any claim which shall be taken by the second party by the location of scrip. In any and all cases said *second* party *is to show the boundary lines for the said claims to any parties whom first party may send for the purpose.* It is mutually agreed that in the actual purchase of land, or the location of scrip, the said sum of

five cents per thousand feet of saw timber as measured by the larger owners of western Montana shall be paid to second party when receiver's receipt is issued. *In the matter of location under the timber and stone act, the commission is to be paid when the receiver's receipt is issued and the land properly transferred to the first party, or his assigns.* This where the location has been made *by parties furnished by second party.* But where the locations are accepted and filed on *by parties sent by the first party*, then *the commission* to be paid as soon as an estimate can be reasonably made, not exceeding 30 days. But such amount to be returned to first party in case the entry shall be contested and lost, on the ground that it was not subject to entry under the timber and stone law. Said R. M. Cobban *agreeing to furnish a reasonable amount of money to said second party to be used in buying options* and patented timber claims coming within the meaning of this contract. In other words, first party on receipt of title is to pay to said second party five cents per thousand feet on all timber acquired through the said second party. Except the two pieces receipted for May 6th, 1899. And said second party agrees to acquire said lands at lowest possible price for the said first party, giving to said first party all benefit derived from commission or discounts except as above mentioned.

In witness whereof the parties hereto have set their hands and seals.

R. M. COBBAN.

C. L. GRISWOLD

Executed in duplicate.

Griswold testified in substance as follows:

Residence, Missoula; business, groceryman; lived in Montana nine years; followed the timber and lumber business for ten years in Wisconsin before moving to Montana; made acquaintance of Cobban in spring of 1899 at his home in the Clearwater. On first meeting him he desired to procure a quantity of timber in that vicinity; went with him and showed him one or two claims, which he subsequently bought; made written contract with him May 22, 1899 (Exhibit A, *supra*). "Performed my part of contract, working under it until following October, when the work stopped, because Cobban told me Clark refused to take any more land." (P. 161.) "I began selecting lands; got plats of several townships from the United States land offices at Helena and Missoula, showing lands subject to entry under the timber and stone act; examined those townships; reported to Cobban desirable pieces in townships, Missoula and Deer Lodge counties. I wrote little slips, giving descriptions; sometimes gave them to parties there and they would take them to Cobban; sometimes sent Cobban the lists, and sometimes gave them to him in person, and he sent parties to take them up. (Pp. 18 and 95.) "I have here the descriptions, names of the persons I located by men engaged for that purpose, pursuant to the contract with Mr. Cobban. (P. 21, Exhibit B, Vols. P and I, p. 209.) I was authorized by Cobban to say to the persons who selected lands that all of their expenses would be paid, and in addition each have $100 for conveying, after receiver's

receipt, to him. (P. 299.) I caused it to be known in Clearwater district that I wanted men and women to take up claims; parties would come to know if they could get claims; what there was in it for them clear of all expenses, and I answered, according to my instruction, that Cobban would pay $100 apiece and all expenses. It was generally known throughout the Clearwater or Blackfoot country. (P. 69.) I had no difficulty in finding persons willing to make entries; on the contract I couldn't find claims enough. In conversation with Cobban I told him some of the parties wanted more than a hundred dollars, and he said that he couldn't give it, but told me that he could send more people from Missoula at $100 than I could find claims for." (Pp. 158, 159.)

"I located the following: Hiram Dodd, Matilda Dodd, Harrison Dodd, Lizzie Dodd, Edward Dodd, Cora Dodd, Marion Watson, T. H. McConnell, C. B. Sperry, Harriet Watson, D. E. Watson, Albert Jemison, Lelia T. Bryan, John B. Catlin, Leon Barrett, Bell Bryan, Edgar Lehman, H. C. Dorman, Martha E. Wright, John Gillis, Charles Cloutier, B. Frank Chattin, Thomas Pelkey." (Pp. 23, 24, 25, 26.)

Concerning Albert Jemison, who corroborates Griswold, the latter testifies in substance: "I gave him a slip with discription of land thereon, named his witnesses, and directed him to Cobban. After proving up on it, he sold to Cobban. He came to my place; said he understood I was taking up claims, and wanted to know what there was in it for him. I told him they

were paying $100 each over and above the expenses. I afterwards hired him to assist me in finding tracts for entry, to show them to the parties, and to do whatever was necessary to carry out my contract with Cobban. He worked several months, and located many of his relatives, named on pages 115, 469, and a large number of others named in the bill of complaint." (Pp. 111–118.)

Griswold, in substance, further testified: "I informed each of my assistants of the arrangements that I had made with Cobban. (See instructions to Kilbourne, p. 210) In every case where I located under the contract it was distinctly understood they were entering the land for the benefit of Cobban, and immediately after final proofs were to convey to him or such person as he might name, for $100 above their expenses, and, so far as located by my assistants, subsequent events show my instructions were fully carried out. . I know this by examination of the records and from conversations had with many of them. From the beginning under my contract with Cobban until the end I never had any understanding other than the one I have named, namely, that the entrymen and entrywomen were to have nothing whatever to do with the land. They understood from the beginning they were immediately after receiving the final receipts to transfer their interest to Cobban or whom Mr. Cobban might elect." (Pp. 342–346.)

The record shows Griswold was directly or indirectly connected with nearly all entries; acted as

witness in many cases; in short, was Cobban's general manager; that he was intrusted with large sums of money to enable Cobban to acquire title. We now refer briefly to testimony to show how Mr. Cobban and Mr. Griswold "fell out," and the Government thus became possessed of the facts.

Respecting the "loan" feature, Griswold says:

> I had several conversations with Cobban at various times at Clearwater, Ovando, and Missoula in regard to paying out money that he left in my hands, to the effect that I should not pay out money until I was sure of securing the land in the end as far as I could go without a written agreement or instrument.

On cross-examination:

> Question. Now, wasn't the conversation in fact to the effect that you must not make any bargain or agreement with anybody to take their land?
>
> Answer. Not at this time.
>
> Question. Well, what time was that?
>
> Answer. Subsequent to this.

In answer to the question, "I wish you would tell us about that, then," the witness in substance testified:

> To the best of my recollection that conversation occurred between Mr. Cobban and myself at his office in Missoula about the 1st of September, 1899, after the principal portion of these applications to purchase had been made. It seemed he had become a little uneasy regarding the manner in which he was securing these lands. He then said he didn't want me to make any contracts or agreements from that

time or prior to the time of making the application to purchase. He then gave me instructions to say to the different entrymen and entrywomen that he would advance the money in the form of a loan.

If the Court will turn to the record (Vol. I, 360–484; Vol. II, 533–590, and Vol. XIII, p. 6604), it will there find the testimony of Albert Jemison. For a correct appreciation of this testimony it is essential for the Court to bear in mind these facts: That Albert Jemison was the principal agent employed by Griswold on Cobban contract; that later in the season of 1899 he worked directly for Cobban; that he was authorized to and did locate many; that he himself took up a claim for $100 (p. 377); that when Mr. Zevely, of the Department of the Interior, made investigation of this case Jemison made an affidavit (Exhibit H, Vol. XIII, p. 6604) which shows his participation in the fraud; that Jemison afterwards appeared before the Federal grand jury when the indictments were returned against Cobban et al. As a Government witness he has not been prosecuted for perjury.

Jemison testified in substance as follows: Age, 24; have lived in Montana about thirteen years; now running saloon at Clearwater. (P. 363.) "I took up a claim under the following circumstances:

"Went to Griswold so I could work with him and locate myself and other people. (P. 368.) Explained my purpose and he told me if I wanted a claim to locate one myself and there would be a chance for me to

sell the claim and I would get $100." (P. 370.) I did; my father, Jacob F. Jemison, and brother Charles also made locations; Griswold went with us. (P. 371.) Then Griswold sent me to Missoula to have John B. Catlin make out our filing papers; father went same time; Griswold gave me a little piece of paper, which I delivered to Catlin. Catlin's name was at top, Griswold's at the bottom; the description of two claims was on it. Gave paper to Catlin; he made out our filing papers, and took us to land office (pp. 372–373). At the end of sixty days father and I went again to Missoula, and we proved up on our claims (p. 375), Catlin going with us to the land office (p. 378). We proved up in the forenoon and sold to Cobban in the afternoon, signing deeds. Father received $115 in cash; I received $115, taking up order out against me for $42, and balance in cash (p. 377). I got my $100 clear, as agreed with Griswold (p. 379); I had also seen Cobban about getting the money and about proving up on the claim. Afterwards I was engaged for several months assisting Griswold, making locations for other people and running compass for the estimators (p. 383). As the result of a talk with him he told me to locate people on claims, and at first I took them to him and he took them to Cobban's office, and afterwards I reported myself. (P. 384.) We would go into the timber, find claim that had enough on it; I would give locator a piece of paper on which was written his name, my own, number of claim, and send him to Catlin in Missoula. I located

over 40 men and women. (P. 385.) Under my contract with Griswold he was to pay me $10 a location Sometimes he allowed $15. I received $10 apiece from the persons located; sometimes they paid me themselves, or would leave it in town. (P. 386.) There was only one or two that I said anything to in regard to what they were to get. 'They knowed themselves.' 'They would come and want a claim, and I guess they knowed what they were going to do with it' (P. 388.) In each case I gave them a note to Cobban and Dinsmore's office, or Catlin, who was working there. In cases I recollect of telling the locators what they were going to get, I think I told them that they could sell claim and get $100 clear.

"Of the people that came to me, I was not able to satisfy half of them (p. 390). I never had any trouble in getting pay from Griswold. There were five or six different bunches of payments, in each of which there were a number of names and locations (pp. 391–392–396.) The names of one are set forth in Exhibit D, which is in my own handwriting" (which appears on page 226 of the record).

The witness's attention being called to the circumstances attending locations by him of persons named in exhibit, the sum and substance of all the testimony is that he took the entry men to claims previously selected, as having the required amount of timber on them, and then sent or went with them to Cobban's office, where the filing papers were prepared; and, as appears from the abstracts and other recorded docu-

ments in evidence and testimony of entry men and entry women, they made entries, and sixty days thereafter final proof was made, land was paid for with Cobban's money, deeds executed and delivered to him by them on the same day, or shortly after, each one $100 above expenses.

Jemison further testifies that when a number of the entrymen were in camp in the mountains "I talked to all of them." "Question. What did you say to them? Answer. Well, they wanted me to locate them, and I told them I would put them on the claims, and they could file on them and prove up, and they could sell their claims to R. M. Cobban, or Cobban & Dinsmore, if they wanted to take $100 and all expenses. (P. 461.) I told Albert Ely (p. 457) that he could get $100 over his expenses; also John Murtaugh (p. 463); also Abraham J. Jemison. (P. 424.) As I said before, when my mother wrote up to them and they came up there, they knew about as much about it as I did. (P. 419.)

"All the persons (about 40) that I located were in the Missoula land district, and among them were the following relatives of mine: Jacob F. Jemison, father; Evaline J. Jemison, mother; Zora Jemison, sister-in-law; Recy M. Jemison, sister; Lavinia I. Gilman, sister; Joshua C. Gilman, brother-in-law; George P Jemison, brother; Emma Dildine, sister; Laura Roll, sister; George Dildine, brother-in-law; Matilda Eddy, niece; Thomas Roll, brother-in-law; Charles M. Jemison, brother; Abraham Jemison, brother.

"I let it be known in my neighborhood I was doing business for Cobban, that when they had made their final proof they would get all their expenses and $100 in addition from Cobban. When I testified for Evaline Jemison when she made final proofs my understanding was that when she finished her final proof she was to go to Cobban's office and make a deed to him, and such was my understanding in the case of Mrs. Yarger, Emma Dildine, John B. Reeve, Albert Starkie, Eliza E. Reeve, and John Murtaugh, and that they were each to receive $100. My claim and father's were the first that I took up under the Griswold contract and Mr. and Mrs. Hardy, R. M. Cobban's father-in-law and mother-in-law, and Simon F. Cobban, his uncle, were the first under the Cobban contract."

Here we have Griswold and Jemison testifying that locations and entries were made by prior agreement; that entry men and entry women were to sell at once after receiver's receipt to Cobban and receive $100 in excess of expenses.

The record discloses lands were sold to Cobban; that most of the entry men and women went directly from United States land office to Cobban's office, signed deeds, and received $100 net.

The following named admit they received in round numbers $100 above expenses: Frank B. Arey, page 1140; Hannah B. Arey, page 1691; Leonard Barret, page 1572; Harriet F. Bryan, page 1358; Lelia T. Bryan, page 1149; Lizzie T. Catlin, page 2200; B. F. Catlin, page 1757; Daisy L. Chattin, page

6209; Levi B. Cyr, page 2114; Vital Cyr, pages 2117, 2649; George Dildine, page 1673; Emma Dildine, page 1923; Edward Dodd, page 1423; Cora Dodd, pages 1423, 1384; see pages 1388 and 1389; M. P. Dunham, page 2283; (in the case of Edward D. Doney and his wife, Martha M. J. Doney, we claim that substantially the same sum was received; see pp. 1621–1624); Herbert Eddy, page 1212; Mary Eddy, page 1236; George P. Jemison, page 1844; Recy M. Jemison, page 1846; (George says, "I was given to understand by my brother Albert that I was to ask no questions," p. 1862); Albert E. Ehle, page 2822; Nellie J. Ehle, page 2897; Joshua C. Gilman, page 1544; Lavinia I. Gilman, pages 1544, 1524; J. G. Hendrix, page 2036; Abraham J. Jemison, page 1252; see 1263; Zora Jemison, page 1252; Albert Jemison, page 377; Charles H. Jemison, page 1132; Eveline Jemison, page 1314; see page 1263; Jacob F. Jemison, pages 377, 1157; Thomas H. McConell, page 1948; Dan McGillis, page 6114; in Effie M. Kilbourn's case, pages 2208–2250, some lots were in the transaction, but we claim that in substance it is the same as the others. She was located by her husband, who was one of Griswold's agents, and hers is a pure case of speculation, also prior agreement; James Mize, page 1185; sold on same day to Cobban that he proved up, but could not remember how much he did receive; Jennie Mize, his wife, page 6195; says she received a check for her land, "but I didn't look to see the amount of it;" Charles H. Moss, page 1091; Oliver E. Much-

more, page 906; Albert F. Muchmore says he received a credit at Jackway & Faust's store, but he does not remember how much, page 1004; Guy W. Muchmore, page 1168; Elizabeth A. Muchmore, page 6218; Oscar Muckenheim, page 2152, he claims he got considerably more than $100, but he sold to Cobban on the same day he made his final proofs; John Murtaugh, page 838. "The distinct understanding from the beginning was that I would get $10 for my expenses and $100 for the claim after I had made final proof and sold it to Cobban. I did receive from Mr. Cobban his check for $100 on the First National Bank of Missoula." Thomas Roll, page 1561; Charles B. Sperry, page 877; James W. Wheaton, page 1304; Calvin Yarger, page 1998; John B. Catlin, page 4854; Eliza A. Reeve, page 3129; John B. Reeve, page 3170; Laura A. Roll, page 1479; Robert Starkie, page 3061; Mary A. Starkie, page 3099; Martha E. West, page 2178; Marion B. Watson, page 5065.

Cobban, Clark's grantor, admits all material facts, but he insists that no prior agreement was exacted from the entry men that they would convey to him, and insists that after final proofs were made they were to secure the loans which he had made by notes and mortgages. He claims that when they came to his office for that purpose he proposed to purchase the lands from them. He admits that in each case his proposition was accepted; that he obtained deeds from all of them, for which he paid them $100 and expenses; that in no case did the entry men refuse to sell the

timber, and in no case did he receive a mortgage or note.

Cobban himself admits that his intention was to buy the lands when receiver's receipt had issued (Rec., p. 5168), and that he borrowed from the banks—one of them defendant's—the money required. Copies of said note are in Pleadings and Index, pages 283–306.

He admits that he sent or accompanied the following-named entry men and located them in timber claims, which he afterwards bought: (Rec., p. 5215).

Thomas Pelkey, Leonard Barrett, Charles H. Moss, John Saleen, Daisy L. Chattin, C. C. Snyder, Elvira M. Hardy, John M. Hardy, and that he knew of John B. Catlin, Lizzie T. Catlin, and Martha E. Wright going to said claims.

At times on his cross-examination, he says that he located entrymen, paid all of their expenses, and for the land itself to the end that they might thereafter obtain title for their own benefit, and that all he was to get for his services was the paltry sum of $100, which with the amount he had loaned was to be secured by note and mortgage. (Rec., pp. 5239–5248.)

That there is not a word of truth in this claim is evidenced by the fact that in not one of the 80 cases was this agreement carried out. No one of them gave him a note or mortgage. On the contrary, all of them sold to Cobban and received from him $100.

On page 5371, Cobban is asked this question:

> Question. Well, now, just tell me, as near as you can recollect, Mr. Cobban, just what your

modus operandi was? How did you tackle the man as to buying the land? What did you say to him?

Answer. After the parties had proven up and came to fix up the papers for their loan I would say to those parties: "Now, if you want to sell the land I will give you so much for it." They would signify their wish whether to sell or not. Oftentimes there was some bantering back and forth; some of them would not accept my offer and some of them would. Perhaps later on they would come and fix up the offer, and if they did not want to accept the offer they were to secure the proposition by the mortgage.

Question. But in each and every instance they did sell to you, as far as those that are named in the bill of complaint are concerned, and no one of them did give you a mortgage?

Answer. That was the case, I believe (p. 5372).

Question. You had been pursuing the course that you have named from the beginning of these transactions; that is, calling the attention of the entry men, after they had made their final proofs, to the fact that you were in the market buying lands, and that they could sell to you if you could agree on the price?

Answer. If I could buy of them; yes, sir.

Without wearying the court with further reference to Mr. Cobban's testimony, we summarize it as follows:

The fact is established that he was in the market to buy these timber lands; that he did buy them as soon as the entry men obtained title thereto, and shortly

thereafter he sold all of the said lands to the defendant in this case; that all of said lands were bought and paid for by Cobban himself, the entry men and entry women acting as mere dummies to enable him to obtain title to 16,000 acres of land when, under the laws of the United States, he was only entitled to 160 acres, a legal right of which he had availed himself prior to entering upon this illegal enterprise.

Such are the facts and circumstances of this case. The question now is, what is the legal significance of such facts and circumstances?

The Government claims they show that said entrymen and entrywomen, at the procurement of Cobban and his associates, violated both clauses of the oath which each of them was obliged to take at the time of making their original entry.

The first clause of the oath is as follows: "That the entryman does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit." This is known as the speculative clause of the oath, and the Government insists that the term "speculation" means just what it says, and is used by Congress solely in that way.

The lexicographers define the word "speculation" as follows:

> The act of laying out money, or of incurring extensive risks, with a view to more than usual success in trade.

Applying this definition, it follows that where an entryman, at the time he makes his application for

the purchase of land described in his filing statement and makes oath to the same, does so with the fixed purpose and intent of selling the same at once on his obtaining a receiver's duplicate final receipt, to a certain man, for a certain sum of money, which he knows at the time he can receive, he violates said act of Congress. In other words, Congress intended that the land acquired by the citizen should be for his own exclusive use and benefit, and that the primary purpose of the entryman was to acquire title to the land in precisely the same manner as under the homestead and preemption laws.

The oath required of the entryman is substantially the same in each of said acts of Congress. Under any of said acts the man who, for a price named in advance, either directly or indirectly, enters upon Government land, not with the intention of acquiring title thereto for his own exclusive use and benefit, but with the intention of at once selling it to another, not only violates his oath, but does all in his power to destroy the beneficent purposes which Congress had in mind at the time said laws were passed. He simply becomes a tool, or a dummy, to enable wealthy men or corporations to acquire the ownership of vast tracts of land. How said laws have been perverted and have been used for said illegal purposes is known to all men

In this case the fact is absolutely established that the sole purpose which induced each one of the entrymen and entrywomen named in the bill of complaint to take

up a timber claim was that they might sell it to Cobban and receive from him $100. It was utterly immaterial to them whether the land which they entered was good or bad, or whether it had much or little timber growing or standing thereon. They were each and every one of them taken to the land, and were told that that would do to enter, and when they obtained the receiver's receipt they could sell it and get a hundred dollars.

When land is taken up under such circumstances, title thereto is acquired contrary to said clause of said act. This court has so held in *Hawley* v. *Diller* (178 U. S., 476), as that was the precise question submitted for decision in that case.

Mr. Secretary Smith, whose decision is sustained, reviews all the facts of the case. As they are so similar to the facts here, we urge the court to examine his opinion found in 17 L. D., 468; also the decision of the Court of Appeals, *Diller* v. *Hawley* (48 U. S. App. 462).

In *U. S.* v. *Detroit Timber & Lumber Company* (131 Fed. Rep., p. 668) the court finds that the speculative clause of the act was violated.

Appellant claims that the proof shows that all the entry men also violated the "prior-agreement" clause of the act, and thus within the rule declared in *U. S.* v. *Budd* (144 U. S., 154).

Appellant insists that the courts have misconstrued this case. That instead of its being a full and complete construction of all the provisions of the timber and

stone act, and establishing a general rule, it simply decides the case before it. The case is first reported in 43 Fed., page 630. The bill discloses that but one patent was sought to be canceled, namely, that issued to Budd. In the opinion of Judge Hanford and in that of Mr. Justice Brewer all the language must be read in the light of this one specific charge. In the opinion of this court it is said:

> The particular charge is that Budd, before his application, had unlawfully and fraudulently made an agreement with his codefendant, Montgomery, by which the title which he was to acquire from the United States should inure to the benefit of such codefendant. Upon this question the fact that stands out prominently is that there is no direct testimony that Budd made any agreement with Montgomery or even that they ever met or either knew of the existence of the other until after Budd had fully paid for the land. No witness ever knew or heard of any agreement.

Under such circumstances the court refused to annul the patent, on the ground that as there was no direct proof testimony in similar transactions, if not incompetent, was insufficient.

In this case, however, the record shows that in each and every case the entry man knew of Cobban; that he paid for the land and engineered the transaction from beginning to end, and appellant insists that the fact is also absolutely established, not by the confessions of the parties, but by their acts, which are much more convincing than their denials, that each and all of the

entries were made by reason of a prior agreement with him and for purely speculative purposes.

Both Secretary Smith and the Court of Appeals recognized this distinction, and by affirming said decisions this court, in *Hawley* v. *Diller*, *supra*, also recognized it.

Appellant therefore insists that there is no real conflict between the two cases, *U. S.* v. *Budd* and *Hawley* v. *Diller*. On their authority appellant insists that the proof in this case sustains the charges made by the bill and that it is conclusively established that all of the patents sought to be cancelled were obtained by the fraud and perjury of the entry men and entry women, and that they were hired so to do by Cobban.

The next question is this: Under the terms of the timber and stone act, is it possible, under any circumstances whatever, for a man to become vested with the rights of a bona fide purchaser who completes his purchase before patents have issued?

CONSTRUCTION OF THE BONA FIDE CLAUSE OF THE TIMBER AND STONE ACT.

Section 2 of the act of June 3, 1878 (U. S. C. S., 1545), reads:

> If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, *except in the hands of bona fide purchasers*, shall be null and void.

Appellant claims a man can not be a bona fide purchaser before patent. (*Hawley* v. *Diller*, 178 U.S., 476.)

The courts below have thus far held that under some circumstances he can be.

The argument of the precise question now here can be simplified by ascertaining the points on which all are agreed:

1. It is agreed, before patent issues, the guilty entry man, and the innocent purchaser from him, forfeits all moneys paid for lands, and all right to both, if officers of the Interior Department, on ascertaining entry man's fraud, take proper steps to annul the receiver's receipt.

2. It is agreed, after patent, if guilty entry man has not sold, he also forfeits money and land, if, ascertaining the fraud, the Government proceeds, in equity, to annul patent and fraud is completely established.

Appellant contends that the innocent purchaser from a guilty entry man, before patent, stands in his shoes from beginning to end; he can buy no more than the entry man has to sell; with the guilty entry man he falls before patent or after, at any time within the statute of limitations (C. S. U. S., p. 1521), because the entry man has neither a valid equitable title by the receiver's receipt nor title by the patent.

The courts below, holding against us, admit that entryman and purchaser are as one before patent, but hold that the moment patent issues they part company, and from that time, while the Government can file its bill to avoid the patent if still owned by the guilty entryman, it can not do so if prior to patent he has sold

to an innocent purchaser. In other words, the innocent purchaser who, during the interval between receiver's receipt and patent, could make no defense, and must lose his investment if his vendor has defrauded, can, from the moment patent issues, assert all the rights of a bona fide purchaser; and, if innocent of the entryman's fraud, can retain the land, notwithstanding the fraud is established; that the mere ministerial act of issuing the patent prevents the Government from doing an hour after what it could have done an hour before. We contend that in so deciding, said courts have entirely misapprehended the rule established by this court in *Hawley* v. *Diller*.

The syllabus of that case is as follows:

> The purchasers from an entryman, before the issue of a patent, are not bona fide purchasers who are protected against the cancellation for fraud of the entryman, of an entry made under the timber and stone act of June 3, 1878, chapter 151 (20 Stat. L., 89).

In that case, as here, it was contended as between a purchaser and the United States he must be deemed to have been a bona fide purchaser from the moment he bought in good faith from the vendee of the guilty entryman (although no patent had issued), and that under the act he could not be affected by the fraud of the original entryman or his assignee.

This court decided that—

> While the mere words of the act of Congress furnish some ground for this contention, the interpretation suggested can not be approved.

Mr. Justice Harlan reviews all the cases and the principle so clearly declared by Mr. Justice Miller in *Root* v. *Shields* is reaffirmed and this result is reached:

> The purchasers from an entryman before the issue of a patent, are not bona fide purchasers who are protected against the cancellation for fraud of the entryman of an entry made under the timber and stone act.
>
> That if any doubt existed on the subject the construction so long recognized by the Interior Department, in its administration of the public lands, should not be overthrown, as it is not, by the words of the act.

In that case the jurisdiction of the Interior Department to cancel the original entry was challenged as the jurisdiction of the courts to cancel the patent is now challenged.

The answer of the court was:

> The exclusion of mere speculators from purchasing the public lands referred to in the timber and stone act would be of no practical value if it were true that one, having purchased in good faith from an entryman, who is proved to have sworn falsely in his application, could demand of right that a patent be issued to him.
>
> The Land Department has authority, at any time before patent has issued, to inquire whether the original entry was in conformity with the acts of Congress.

Appellant claims that the judicial department has the same authority, after patent has issued, within the period of limitations, until the land is purchased by a

bona fide purchaser; that the guilty entryman and his assignee can be reached as well after as before patent; that the Government still has power to protect itself from fraud and perjury; that the forum of its exercise alone is changed. This results from the law governing the receiver's receipt, as declared by this court:

> The purchaser knows that the receipt is but a voidable contract, liable to be thereafter avoided in case his grantor has defrauded the Government. (*Parsons* v. *Venzke*, 164 U. S., 89.)
>
> He also knows that the Commissioner of the General Land Office may direct the proper local land officer to hear and pass upon charges of fraud against the entryman, by which he secured said receipt, and that said Commissioner has power to review the judgment of the local land officer in respect thereof, and that the Secretary of the Interior has jurisdiction to review such judgment of the Commissioner and to order such an entry, shown to be fraudulent, to be canceled. (*Orchard* v. *Alexander*, 157 U. S., 372.)
>
> The receiver's receipt does not transfer the title to the land from the United States to the entryman; it simply furnishes prima facie evidence of an equitable claim upon the Government for a patent, and the use of the receipt for that purpose is subject to be destroyed by the cancellation thereof under direction of the Department. This is the legal effect of such receipts or certificates, and all who deal in them, or found any right upon them, must be held to do so with full knowledge of the character of such papers. (*Guaranty Savings Bank* v. *Bladow*, 176 U. S., 448–454.)

> The purchaser knows, at the time he makes his purchase, that an entryman only becomes the equitable owner of the land when, *with clean hands*, he has in all respects complied with the law and paid the Government for his land. (*Myers* v. *Croft*, 13 Wall., 291.)

In *Thayer* v. *Spratt* (189 U. S., 350), it is said:

> We do not refer to the bona fide character of purchase by defendant from the entryman, for the purpose of thereby showing the defendant to be entitled to the benefit of that character under section 2 of the timber act of 1878. The reason that he is not so entitled is that, by the assignment of the certificates, he did not become clothed with the strict legal title to the land, but simply with an equity, and the act does not cover such a case. (*Hawley* v. *Diller*, 178 U. S., 476.)

In *Cogswell case* (3 L. D., 23) Secretary Teller says:

> He purchases with notice that the Land Department is but an administrator of the law, and that it has no authority to issue patents to preemptors or entrymen who have not complied with the law.

In *U. S.* v. *Steenerson* (50 Fed., 507), it is said:

> He likewise knows that if the entry of the land was not made in good faith, but in fraud of the law, that such fraud on being discovered and established will vitiate all acts based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist.

Appellant insists that these decisions, and the reasons on which they are based, establish its right to cancel the patent as well as the original entry.

That as the officers of the Interior Department had jurisdiction, on discovering the frauds in the *Hawley* v. *Diller* case, to cancel the receipts and thereby cause innocent purchasers, for value, to suffer a total loss, so in like manner if they had discovered said frauds one hour after patents had issued, said officers could take steps to undo their acts by asking the Attorney-General to proceed in equity to cancel the patent.

It is simply a case of jurisdiction—before patent, in the Interior Department; after patent, in the courts.

The decree of the lower courts are erroneous in this: They failed to recognize this continuing power of the Government; in deciding that simply because, by issue of patent, the officers of the Land Department lost jurisdiction, that all power to undo the fraud was gone.

The true rule is, that the courts acquire jurisdiction the moment the Interior Department loses it. This is recognized in *Peyton* v. *Desmond* (C. C. A., 129 Fed. 1), opinion by Judge Van Devanter.

On the subject of the interest obtained by the purchaser from the entryman before patent, Judge Van Devanter says:

> One who purchases of an entryman before the issuance of a patent obtains no greater right or estate than is possessed by the entryman, and acquires at the most a right or equitable estate, which is subject to examination by the Land

> Department while the title remains in the Government. In the absence of a statute providing otherwise, he is chargeable with knowledge of the state of the title which he buys, holds it subject to any equities which could be asserted against it in the hands of the vendor, and takes the risk of losing it if it is subsequently shown that the entry is based upon an error of law or a clear misapprehension of the facts which, if not corrected, will lead to the transfer of the Government's title to one not entitled to it.

As to the power of the Government after patent issues, he says:

> The issuance of a patent, or such other act as passes the legal title from the Government, is the final act, and is the expression and entry of the officers of the Land Department, and this is the act that marks the termination of the jurisdiction of these officers, *and the beginning of the jurisdiction of the courts.* The true rule, drawn from the examination of the authorities, is that the jurisdiction of the Land Department ceases where the jurisdiction of the courts commences, namely, when the legal title passes; and there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law, and protect both public and private rights involved in proceedings for the acquisition of its titles.

Judge Van Devanter, in support of his reasoning, quotes from the opinion of Mr. Justice Lamar, a former Secretary of the Interior, who prepared the opinion of

this court in *Knight* v. *United States Land Association* (142 U. S., 161, 178):

> For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annullment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney-General to take proceedings to annul.

What legal reason can be assigned for the conclusion that Clark, who would have sustained a total loss in case the frauds had been discovered an hour before patents issued, holds an unassailable title *eo instanti* on the issuing of patents, and thereby becomes a bona fide purchaser?

The answer of the lower courts, in substance, is this:

> Because by the issuing of patent the purchaser of the receipt has now the legal title. Assuming that he bought without notice in fact of the fraud, in good faith, and paid a valuable consideration and thereafter he acquires the legal title, before notice of the alleged fraud is fastened upon him, he becomes possessed of all the attributes of a bona fide purchaser and is thereafter safe from attack.

This reasoning ignores the basic principle that the purchaser before patent only buys a voidable contract subject to avoidance at any time before patent issues and, by act of Congress, supra, for six years thereafter. This court has repeatedly decided that in case the entryman defrauds the Government he can be proceeded against as well after patent has issued as before.

> The Government has the same right to demand the cancellation of the conveyance of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stands upon the same footing with a private citizen. (*U. S.* v. *Iron Silver Mining Co.*, 128 U. S., 673, 676.)
>
> But in all such cases the burden of proof is upon the Government, as the presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence and that the law had been complied with by the officers of the Government charged with the alienation of public lands, can only be overcome by clear and convincing proof. (*Maxwell Land Grant Case*, 121 U. S., 225; *Colorado Coal Co.* v. *U. S.*, 123 U. S., 307; *U. S.* v. *San Jacinto Tin Co.*, 125 U. S., 273; *U. S.* v. *Beebe*, 127 U. S., 338.)
>
> Where such convincing proof is furnished and the court is convinced that the patentee obtained his patent by misrepresentation and fraudulent practices, aided by perjury, there is no reason why the United States, as the owner

> of land of which it has been defrauded by these means, should not have all the remedies against that fraud which the courts give to the private owner of a few acres of land on whom a like fraud has been practiced. (*U. S.* v. *Miner*, 114 U. S., 233–241.)

The entryman can not say when his acts are challenged: "You should have discovered this before you gave me the legal title. When you delivered your patent to me the officers of the Interior Department lost jurisdiction and I am now safe from attack."

If he did make such claim, the answer would be: "You have a patent which you obtained by fraud and perjury and you must meet us in a court of equity."

Why should the patent, which is no protection to the guilty entryman, become a complete defense to his vendee? Appellant insists that, as the purchaser stood in the shoes of the guilty entryman before patent, he must stand in them after; otherwise the purchaser bought more than the entryman had to sell. On the contrary, *caveat emptor* applies. Congress intended the purchaser should have no greater rights than his vendor. Until the statute has run the purchaser before patent must defend his title against the charge that his vendor had defrauded the Government. And this, because no title, however evidenced, can stand, which is based on fraud and perjury, so long as it is held by the man who was guilty of the fraud, one in privity with him, or one who purchased before it had been officially declared by issuance of patent that the acts of the entryman were legal.

The foundation of the reasoning of the courts below rests on the doctrine of estoppel and on the theory that there must be a point when a purchaser's title, evidenced by a Government patent, shall be safe from attack. We do not deny that the Government can be estopped from filing a bill for the purpose of obtaining such a decree, and that there is a point when the purchaser's title is secure; that point is reached *when a man in reliance on the action of the officers of the Government in issuing a patent, in good faith, for value, buys the legal title.*

The inherent weakness of the position of these courts is this: It places the purchaser of a voidable contract and the purchaser of the legal title in exactly the same position.

The man who makes the investment with the knowledge that he may never get a patent, and that he is subject to total loss, has just the same defense as the man who makes his investment solely because one has issued.

To work an estoppel against the Government's attempt to obtain a cancellation of a patent, a man must have done something subsequent to its issue and in reliance thereon. The man who makes his investment with the knowledge that the title he buys is open to Government attack certainly is in no position to invoke the doctrine of estoppel when the attack is made on the ground of fraud and within the time fixed by law. The presumption is that he pays a small sum for the entryman's equity in anticipation of a possible

attack. He suffers no loss in case the Government fails to establish by competent evidence that his title is based on fraud and perjury. In case it is, he who buys in contemplation of such a result should stand the loss rather than the United States.

Absence of notice of fraud is an indispensable element of the defense of a bona fide purchase. It is impossible for a purchaser of the receipt to make this defense because by law he is charged with notice. As patent has not issued, he knows that he can not buy the legal title; that the voidable contract may be avoided and therefore *caveat emptor* applies. Knowledge of the law is conclusively presumed. In all cases of statutory forfeitures ensuing from acts done or omitted, an innocent purchaser without notice can not claim precedence of the title of the United States. (*U. S.* v. *Grundy*, 3 Cranch., 338; *U. S.* v. *1,960 Bags of Coffee*, 8 Cranch., 398; *Distilled Spirits*, 11 Wall. 356.)

In the cases cited the forfeiture, by relation, was held to be of the date of the commission of the offense, and therefore subsequent sales to an innocent purchaser were void, although there were regular permits for landing the foods, and the duties were paid, and he bought in reliance thereon.

This is the rule of law where the United States obtains title to property by forfeiture. By how much more should it apply in the construction of statutes providing for the forfeiture of lands, title to which was obtained *from* the United States by fraud and perjury?

Judge Sanborn said:

> The purchaser must acquire the legal estate, but it is not material at what time it was acquired.

Appellant contends that such opinion is contrary to the rule announced in the leading case of *Boone* v. *Chiles* (10 Pet., 179, 209).

> A man who claims to be a bona fide purchaser must, among other facts, allege and prove that his vendor was seized in fee and in possession. The title purchased must be apparently perfect, good at law, a vested estate in fee, for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity.

DOCTRINE OF RELATIONSHIP.

In deciding that the purchaser of the receipt becomes a bona fide purchaser in the event patent subsequently issues, the courts below apply the doctrine of relationship.

In this appellant claims they erred.

In *Hussman* v. *Durham* (165 U. S., pp. 144, 148) it is said:

> Neither can it be said that on the issue of a patent the title by relation always dates as of the time when the certificate of location was issued. A title by relation extends no further backward than to the inception of the equitable right.

For example, if an entryman pays into the Land Office counterfeit money, and in ignorance the officers

deliver to him the receiver's final receipt, having paid nothing, he has no equitable title although he holds in his hands an official paper which evidences it. The same if the entryman has exhausted his right to make entry. He does not receive an equitable title, for there is none, because he has defrauded the United States. It is the same, and one receives no equitable title who enters the land and pays the full Government price, if he acquires for speculation or by prior agreement to transfer to another.

The doctrine of relation is a fiction of the law, adopted by the courts solely for the purposes of justice, and is only applied for the protection of persons who stand in some privity with the party who initiated the proceedings to acquire title and who did in fact acquire an equitable title thereto. But there is no rule for the application of this doctrine when, by reason of an entryman's fraud, he never did acquire an equitable claim or right.

Judge Sanborn, in the Detroit Timber Company case, said, in substance:

> This is a suit in equity, and the equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual in like circumstances. But as between it and the innocent purchaser of the receiver's receipt, the equity of the Government is far less persuasive. The former has received, and still retains, the purchase price which is fixed for this land, and now asks that

it be taken from the purchaser who has innocently bought and paid for it and restored to the complainant.

The ninth Circuit Court of Appeals in this case followed the eighth.

Our answer is this: The officers of the Government in this case are simply obeying the mandate of Congress, which the courts of the United States must likewise obey. It has declared that no man shall be exempt from just such a loss, unless he be a bona fide purchaser. If the innocent purchaser of the equitable title is not in law a bona fide purchaser, by what warrant can any court set aside and hold for naught the plain provisions of the law? The Congress, knowing of the spoliation of the public lands, for the purpose of preserving the timber fixed the penalty for fraud and perjury.

Appellee, before he took a step toward the purchase of these lands, knew this law; knew he could not bring himself within the exception; knew if any entryman violated it he would get no title; knew at purchase that each step taken by the entrymen in the local land office, and all acts on which the receiver's receipt was based, must be reviewed by the Interior Department to ascertain if the law had been complied with; and knew if such examination showed the entryman had been violating its provisions he would lose his entire investment.

He took his chances, and now seeks to escape the loss, the risk of which he deliberately assumed, because,

having paid the purchase price, his so-called equity, which is no equity, is superior to the ownership of the United States. Such a purchaser has no equity the courts can recognize.

IF THE COURT FINDS APPELLANT HAS PROVED THAT THE ENTRIES WERE FRAUDULENT, AND SUSTAINS OUR CLAIM THAT ISSUANCE OF PATENTS DOES NOT TRANSFORM APPELLEE, AS PRIOR INNOCENT PURCHASER UNDER RECEIVER'S RECEIPTS, INTO A BONA FIDE PURCHASER, NO FURTHER FACTS OR ARGUMENTS NEED BE CONSIDERED.

It is only necessary to consider defendant's knowledge of these antecedent frauds if the court rejects our said contention. Then we must convince this court that appellee was not *in fact* an innocent purchaser, but knew actually or constructively of Cobban's illegal acts.

The proof demonstrates defendant had such knowledge; that prior to the spring of 1899 the Big Blackfoot Milling Company, one of the Amalgamated Copper Company's corporations, had invaded territory which appellee claimed adjacent to a stream in Missoula County, called The Nine Mile, purchasing timber lands. Hard feelings were thus engendered, and in retaliation appellee determined to invade Big Blackfoot territory. (Record, p. 4475–4480.) Shortly after a conference was held in appellee's office in Butte, attended by him, his timber agent, McLaughlin, his attorney, Bickford, and Cobban. At its conclusion Wethey, Clark's general manager, was informed of his purpose. (Rec., p. 4484.) It was also

necessary that appellee should buy largely for his mines, lumber yards, etc. (Rec., p. 5114.) At the outset appellee thought 40,000,000 feet in the Blackfoot country enough. McLaughlin urged buying at least 100,000,000. (Rec., p. 2690.) Appellee only authorized 40,000,000. Thereupon McLaughlin, through Cobban, bought and paid for 40,000,000. (Rec., p. 2690.) Cobban hired the people to make entries. When the news was spread a stampede to obtain chances to locate resulted. (Rec., p. 2253.) Entries were made as set forth in bill. All received money from Cobban; all deeded to him. Sixty days must elapse between filing and final proofs. Cobban required no money until then. During this period appellee's estimator, William Sparks, was estimating timber upon these filings (Rec., p. 2703), side by side with James Hambley, Cobban's estimator.

Before the time expired McLaughlin examined the estimates and satisfied himself of amount and value. When he approved the estimates Cobban was enabled, at banks in Butte and Missoula, on his unsecured demand note, or short-time paper, to obtain money to pay into the United States land office, pay entrymen $100 and expenses, obtain final receipts for the entrymen and their deeds to himself. Recording these and obtaining abstracts showing such record he executed deed to Clark and received the price long before agreed upon, viz, $1.25 per thousand. Thus, 40,000,000 feet which Cobban sold to Clark, and embraced in two deeds of July and two of September, were paid for.

While this was going on, McLaughlin was urging Clark to buy more, telling him that the 40,000,000 was insufficient to check the Blackfoot people; that later on he could sell at an advance, or exchange his holdings on the Blackfoot for those of the Blackfoot Milling Company on Nine Mile; that other people would buy on the Blackfoot if he didn't, and it was for his interest to take all Cobban could get there. (Rec., 4502.) October 13, a few days after his deed to Clark, Cobban submitted to Clark a written proposition, page 4413. In it he said:

> I now have about 40,000,000 feet of titled timber on the Big Blackfoot River and about 30,000,000 feet of scrip timber, making a total of 70,000,000 feet. I expect to have, between now and December 15, 60,000,000 feet in addition to this. I will quote you a price of $1.25 per thousand for this timber. Would prefer a loan, not exceeding $75,000, to be made as fast as title is examined and estimates furnished, at the rate of 75 cents per thousand, said loan to be for one year from the 1st day of next January, with interest at the rate of 10 per cent per annum. In the event of making such a loan, I would be willing to give you an option to the 1st of February next for the purchase of all lands under mortgage at the rate of $1.25 per thousand feet. If you do not purchase you would have a loan that would be as safe as anything I know of.

Thereupon Clark determined to buy 40,000,000 more. He writes as follows (Rec., p. 4418):

> OCTOBER 16.
>
> I have yours of the 14th inst., relating to Mr. Cobban's proposal for a loan. I note that his desire is to realize the money that he has invested, *and to secure additional timber lands.* Would he also give me an option on the 30,000,000 feet, with an additional loan of what he needs, also upon an advance of 75 cents per thousand upon that? I am willing, all these conditions being complied with, to make a loan on the 40,000,000 feet of timber.
>
> OCTOBER 20.
>
> I have yours of the 19th inst., which I return. I would be willing to make a loan on the same basis for an additional 60,000,000 feet of timber. That is to say, to advance 75 cents per thousand on located lands for which he is to procure titles, and 50 cents per thousand for lands upon which he has located scrip. Of course everything would be subject to McLaughlin's approval, after having the timber estimated, and the approval of Mr. Bickford as to the legal character of the conveyance. (Rec., 4419.)

As before, Cobban borrowed on short-time paper at 10 and 12 per cent to pay for lands, the defendant having all the time his estimator, Sparks, up in the mountains with Cobban's estimator, estimating the timber, as soon as Cobban located a person. Again, a few days after final proofs, delivery of deeds to Cobban, he conveyed to Clark, secured further loans, liquidated his notes at bank, and thus obtained more land for Clark,

having been assured that Clark would take all lands he could get on Blackfoot of which McLaughlin would approve.

By this process Cobban obtained over 20,000 acres under this act, which he deeded to Clark. Eighty of the claims are described in the bill; others in a bill subsequently brought against Clark, and now pending. In addition the record shows Clark acquired from Cobban many thousand dollars' worth of land by means of lieu land forest reserve scrip, not embraced herein. So, instead of Cobban receiving for the 80 descriptions $217,571.25, he received but $100,000 on the lands herein; consequently, Judge Ross's reasoning, based on the assertion that it was conceded that Cobban received $217,571.25 *for the land in question*, is erroneous.

These facts are established by the letters of defendant; his general manager, Wethey; his attorney, Bickford; by agreements, proposals, notes, and other written documents, nearly all of which were offered in evidence by the defendant's solicitors. (Vol. IX, pp. 4413, 4415, 4418, 4436, 4502, 4514, 4517, 4529, 4546, 4554, 4600, 4602, 4612, 4615, 4630, 4632, 4664.) It appears therefrom defendant was not an innocent purchaser without notice, actual or constructive, of Cobban's operations.

The theory of appellee's answer is that he and Cobban had nothing in common; that Cobban, without any agreement with or intimation from appellee, engaged in getting the lands; bought to sell to no particular person; paid with his own money, and only

afterwards went to appellee to sell; that only after they had agreed did appellee send his estimator to the timber; that then Bickford would examine abstracts, and only on everything proving satisfactory did appellee receive deeds, pay, and close; that though Cobban deeded to Clark in July, September, and November, 1899, and in January and June, 1900, they were not links in one transaction, but separate and distinct.

This answer nowhere admits the now conceded fact that all deeds after September were simply mortgages securing appellee for money advanced to Cobban to buy said lands. The testimony of McLaughlin (p. 2682), called by appellant, but at heart appellee's witness; of Bickford, appellee's attorney (p. 3679); Wethey, appellee's general manager (p. 4385), and appellee himself (p. 5098), are used to sustain the claim that each transaction was distinct, and Clark an innocent purchaser. Wethey, after giving testimony on that theory, was obliged to abandon it, compelled to confess that his previous testimony was not true, and instead of the fact being that when, by September deeds, appellee had obtained the 40,000,000 feet from Cobban, no further negotiations were had until November, the real fact was that negotiations commenced at once, that Cobban, on October 13, 1899, submitted a written proposition asking for a loan from appellee of $75,000, which was granted, and from that time for months, appellee loaned Cobban money, and thereafter all the deeds received by Clark were simply mortgages to secure loans. (Rec., 4402.)

Here is the testimony:

Question. Now, that was a completed transaction (the September one) when this money was paid to Cobban, was it not?

Answer. Yes, sir; that covered the two drafts marked "Exhibits No. 278 and 279."

Question. You had then purchased your necessary 40,000,000 feet of lumber?

Answer. Yes, sir.

Question. And the deal between you and Cobban was concluded?

Answer. Yes, sir.

Question. Well, now, as a matter of fact you didn't stop there, but you purchased nearly 200,000,000 feet altogether?

Answer. We did stop there, and neither the Senator or myself expected to buy any more, and we didn't know that Cobban had any more for sale, and it was only later when he came along again and said he had some more that he made the proposition to give the Senator an option on an additional number of feet that he had secured. He was doing that without our knowledge, and without his revealing to us at all what he was doing. We had no arrangement with him of any kind. We did not know that he was going on and securing timber.

By Mr. BICKFORD. Wasn't that true with reference to all of it?

The WITNESS. Yes, sir.

(Rec., Vol. IX, p. 4494.)

Question. How long after the date of this check marked "Exhibit No. 310," dated September 21, 1899, when you supposed that all

negotiations between yourself—when I refer to you I refer to the defendant—had ended, did you take up new deals with Mr. Cobban?

Answer. In the early part of November.

Question. In the early part of November?

Answer. Yes, sir.

Question. So that between the 21st of September and the early part of November no negotiations had been had between Cobban and yourself?

Answer. I paid money to McLaughlin for Cobban on the 19th of September, and no negotiations were made with Cobban after that date, until the early part of November when he came to me.

Question. You hadn't seen him or had any talk with him in regard to his acquiring any more land?

Answer. I don't believe I had. (Rec., 4495.)

(Recess taken until 2 p. m. same day.)

Question. Now, Mr. Wethey, you stated positively this morning that there were no negotiations between yourself and the Senator on one hand, and Mr. Cobban on the other, between the dates of September 19, 1899, when you gave McLaughlin the money to pay him and close up the deal, and the early days of the following November. Weren't you very much mistaken in that?

Answer. Yes; I was mistaken in that.

Question. How did you find out that mistake?

Answer. Since I left the stand this morning I was looking over the papers, and I found that in my examination in chief I submitted data

and letters in October in connection with the next deal. In giving the dates this morning I was simply taking the dates of the two deeds, the one in September and the one in November, and I did not recollect how long it was before the second deeds were issued that we discussed this matter.

Mr. MAYNARD. I hope you will be as careful as you can on these dates and not rely too much on your memory.

Mr. WETHEY. Yes, sir: I will try to be. (Record, page 4501.)

Defendant's testimony was taken months later in the city of Washington. Nothwithstanding the fact, as appears from the above correspondence, he had written many letters in which he expressly agreed to loan Cobban money, and had so lent him thousands of dollars. We find in Volume 10, at page 5124, he testifies as follows:

Question. Did Cobban ever say anything to you about advancing him money to buy these lands?

Answer. To buy which lands?

Question. These lands which you afterwards bought?

Answer. There was never a word spoken between Cobban and myself about advancing him money to secure any lands. There was never a word spoken about it. He never asked for money to buy lands with.

Question. You never authorized any money to be advanced for that purpose?

Answer. I never did. I do not do business in that way.

We ask the court to weigh this testimony in the light of the fact that in a letter which he wrote to his general manager, Wethey, on the 16th of October, 1899, and which appears in volume 9, page 4418, the defendant says:

> I have yours of the 14th instant relating to Mr. Cobban's proposal for a loan. I understand that the amount of the loan would be 75 cents per thousand, which would amount to $30,000, for which he is willing to pay 10 per cent per annum for four months. I note that his desire is to realize the money he has invested and to secure additional timber lands.

After naming certain conditions, he concludes:

> I am willing, all these conditions being complied with, to make a loan on the 40,000,000 feet of timber.

Notwithstanding this demonstration that the claim set up in their answer is untrue, such claim was persisted in by brief of appellee's solicitor below, and Judge Ross, for the majority of that court, actually sustained this claim, saying:

> We do not think it a fair conclusion to be drawn from the evidence that Clark commenced negotiating for the lands in question before he made his purchase.

But Judge Gilbert reached the right conclusion, saying:

> The evidence shows also that the inspection of these lands by the defendant's agents was contemporaneous with the entries and that large

sums were loaned by the defendant in error to be used by him for the purpose of obtaining title to these lands.

The time between the execution of the deeds by entrymen to Cobban, and Cobban's to appellee was too short for Clark's estimator to examine such a body of lands for quantity of timber. This can be easily ascertained by an examination of the schedule hereinbefore submitted.

Appellee, long before final proofs of entrymen, had caused all lands to be examined and estimates on each tract made. He knew from the time locations were made Cobban would deed, and Cobban knew entrymen would deed to him. These deeds from entrymen to Cobban and from Cobban to Clark were substantially contemporaneous. The fact appears in letters of appellee himself that he lent thousands to Cobban, and therefore Clark could not be an innocent purchaser for value, without notice, actual or constructive, of Cobban's acts.

Solicitors for appellee, forced to abandon their answer and original defense, will claim, and the majority below sustains the claim, that loans were not made until Cobban acquired title from the entrymen, which, with abstracts, were presented to and examined by his attorney, and declared good; that this was a legitimate transaction; that he had a right so to loan money provided he did not know, or by reasonable diligence could not have ascertained, that the money was to be used by Cobban to acquire the lands. We reply, this

is not only contrary to defendant's answer, but it is not true, as the correspondence demonstrates. The record shows that appellee had never lent money on such security (Rec. p. 4585); also because the record shows that Clark *did* loan $10,000 to Cobban to buy lands which at the time had simply been located upon, on the mere promise of Cobban to convey to him when entries were completed, and arranged when this was done he would make Cobban an additional loan on his paying the first $10,000. Here is the proof:

$10,000.00.

BUTTE, MONTANA, *October 31, 1899.*

Thirty days after date, without grace, for value received, we, or either of us, agree to pay to the order of W. A. Clark and Brother, a co-partnership composed of W. A. Clark and J. Ross Clark, ten thousand and no/100 dollars, negotiable and payable at their banking house in Butte, Montana, with one per cent interest per month from date until paid, both before and after judgment, and reasonable attorney fee if suit be instituted on this note. Interest payable monthly.

(Signed) R. M. COBBAN.

(Record, Vol. IX, p. 4427.)

We ask the court to observe the conflicting statements made by Wethey as to how this note came to be paid.

DIRECT EXAMINATION:

Q. I will ask you to state if that is a part of the money that was loaned to Mr. Cobban that you have testified about.

A. Yes, sir; $10,000 was loaned by the bank separately, and was at the rate of 75 cents per thousand feet on the timber. We took up this note from the bank, and that was a part of the second note for $41,538.75.

Question. I will ask you to state, with reference to this matter, Mr. Wethey, whether or not the banking firm of W. A. Clark and Brother, as bankers, and W. A. Clark individually, is a separate concern, or whether they are carried on jointly or have any connection with each other?

Answer. They are entirely separate and distinct, and I have nothing whatever to do with the bank.

Question. Does Senator Clark have any active participation in the affairs or management of the bank?

Answer. No, sir.

Question. Would he know anything of the fact of a loan of this kind being made?

Answer. No, sir.

(Record, p. 4426–7–8).

CROSS-EXAMINATION:

Question. This proposition that Mr. Cobban made to you when he came into your office on the 13th of October, and which you had discussed with McLaughlin on the 10th, was accepted by the defendant, was it not?

Answer. The proposition was accepted; yes, sir.

Question. And how much was paid Mr. Cobban under this proposition when acted upon?

Answer. The land covered in this proposition

is covered by the Exhibits Nos. 283 and 284. Exhibit No. 283 (deed Nov. 13, 1899) is for $33,718.75, and Exhibit No. 284 (deed Nov. 11, 1899) is for $35,512.50, and those two deeds were paid for in the following manner. On November 17, I paid W. A. Clark and Brother to take up a loan made by them to Cobban. (Record, pp. 4532–3.)

Question. How much money did you give him?

Answer. I gave him at the time $29,082.95, and a week later I sent him $1,792.50, and that, with the amount I paid to the bank, $10,063.30, makes up the amount of the loan of 75 cents per thousand, amounting to $41,538.75.

Cobban gave his note for that amount, secured by said deeds.

In regard to this $10,000 loan, on page 4533.

Question. Now, then, if Mr. Cobban did not do business with your bank, how was he able to obtain a loan of $10,000 on his own individual name with no indorsement or security of any kind?

Answer. Mr. Cobban was a man of good standing, and he was supposed to be worth a considerable amount of money.

Question. Was there any conversation had with you with regard to his obtaining $10,000 from the bank?

Answer. Yes, sir.

Question. What was that conversation?

Answer. My recollection is that he was making some deal in Missoula, and wanted some

money, and asked if I could arrange with the bank to loan him $10,000, and my recollection is that I went down in the bank with him, and spoke to the cashier and said Mr. Cobban wanted to use $10,000, and he let him have it.

Question. You have already testified that you had nothing whatever to do with the management of the bank?

Answer. Yes; that is true. It was entirely within the cashier's discretion whether he would let Mr. Cobban have the $10,000 or not.

By Mr. BICKFORD: It had nothing to do with the timber transaction at all, did it?

Mr. WETHEY. As far as I remember, it did not.

Mr. MAYNARD. I object to that question as being interpolated here, as being a gross violation of the rules of conducting the examination, and as leading, and move that the same be stricken out.

The EXAMINER. Yes; Mr Maynard has the witness and counsel ought not to put the question.

Mr. BICKFORD. Yes, sir; I quite agree with the gentlemen.

Question. Now, then, as a matter of fact, the negotiation for the sale of these timber lands had been pending for some time, had they not, between you and Mr. Cobban?

Answer. Yes, sir.

Question. He had been in your office on the 13th of October?

Answer. On the 13th or 14th of the month; yes, sir.

Question. And the whole question was under consideration in your office?

Answer. Yes, sir.

Question. Now, Mr. Cobban was a comparative stranger to you, was he not?

Question. No, sir; I had known him a good many years.

Question. Do you think that if you had not gone down to the bank with him and seen the cashier in regard to this loan that he would have loaned Mr. Cobban $10,000 without any indorser?

Answer. I could not say positively whether he would or not.

Question. But you know very well that it is the rule in your bank that where the borrower has no security of his own to put up as collateral that an indorser is required, do you not?

Answer. Well, I do not know that that is the invariable rule; it depends on who the party is that borrows the money.

Question. While it is not an invariable rule in the sense that there is no exception to it, is it not to your knowledge a general rule in banking?

Answer. I presume so.

Question. Don't you further know that you at that time, in conversation with the cashier of the bank, substantially, if not in so many words, guaranteed this payment?

Answer. I think quite likely I told the cashier that we had some negotiations with Mr. Cobban, and that if the deal went through, before paying him any more money I would protect the

bank. The subject of loaning Mr. Cobban a considerable amount of money had been under way for some time, and I expect that it was my impression at that time that the loan would be made, and it was made.

Question. Now was that the first time Mr. Cobban had secured a loan through your influence?

Answer. Yes.

Question. And it was the last time, wasn't it?

Answer. It was the only time.

This testimony shows that Wethey tried to create the impression that defendant had nothing to do with this loan; that he secured it for Cobban for some deal in Missoula; and he testifies, when led by Bickford, that "as far as I remember, it did not have anything to do with this timber transaction," whereas he soon admits that the subject of lending Cobban money had not only been under consideration since October 13, but a few days thereafter appellee agreed to make it on the basis of 75 cents for each thousand feet of timber Cobban should secure on the Blackfoot. He admits he told the cashier he would protect the bank, and when he later received the deeds from Cobban he took up the $10,000 note.

Appellant claims that it is established by the testimony of Cobban, Clark, and Wethey that Cobban bought the lands in question, because of a prior agreement with Clark that he would lend 75 cents on each thousand, with the privilege of buying by paying 50 cents more; that Clark's agent knew from the moment

the entryman located that he was to sell to Cobban and Cobban to Clark. This is established from the fact that appellee's estimator, William Sparks, commenced his work before the entryman had made his final proofs, and from the fact that Cobban took no steps to sell to others, but almost immediately conveyed to Clark.

The testimony of Bickford relative to his examination of the abstracts furnished him shows that enough information came to him to put him upon inquiry and make it his duty to ascertain the facts; that Wethey knew all or had means at hand whereby he could.

It appears from Clark's own letters that he knew Cobban applied for loans on lands to which at the time he did not have title and agreed to make the loans when title had been obtained. It is unnecessary to charge that appellee had more precise knowledge of Cobban's illegal acts, as we have shown that he was not a bona fide purchaser. The duty to inquire rested upon him. The law applicable to a man in his situation is so well established that amplification is unnecessary.

Appellant insists that it has established the three propositions above discussed.

We therefore ask that the decree below be reversed and the case remanded to the Circuit Court with instructions to enter a decree to the effect that the patents issued to Charles Cloutier, John Gillies, Martha M. J. Doney, Edward D. Doney, Thomas Pelky, B. Frank Chattin, Albert F. Muchmore, Guy W. Muchmore, Oliver E. Muchmore, Elizabeth A. Muchmore, John B. Catlin, Belle Bryan Gillies, Leonard Barrott, Edgar

Lehman, Lelia T. Bryan, Harriet Bryan, May Hawthorne, Harriet Watson, Marion B. Watson, Charles H. Moss, Katie Watson, Cora Dodd, Dock E. Watson, Charles B. Sperry, Thomas H. McConnell, Hiram Dodd, Harrison Dodd, Matilda Dodd, Lizzie Dodd, Vital Cyr, Levi B. Cyr, Mary J. Ehle, Jacob F. Jemison, Eveline Jemison, Albert Jemison, Joshua C. Gilman, George P. Jemison, Sarah Yarger, Emma Dildine, George Dildine, Matilda Eddy, Thomas Roll, Abraham J. Jemison, James W. Wheaton, Mary Eddy, Herbert Eddy, Daisy Chattin, John L. Deering, John Saleen, Charles C. Snyder, Mathew P. Dunham, Frank P. Arey, Dan McGillis, Elvira M. Hardy, John H. Hardy, Effie M. Kilbourn, Arnold Mickels, Clara Belle Mickels, William J. Eddy, Lavinia J. Gilman, Recey M. Jemison, James Mise, Laura Roll, Charles H. Jemison, Calvin Yarger, Zora Jemison, Jennie Mise, John G. Hendryx, Martha E. Wright, Lizzie T. Catlin, Oscar Muckenheim, Stephen Tepper, John B. Reeve, Robert Starkie, Albert Ehle, Eliza A. Reeve, Mary A. Starkie, John Murtaugh, owned now, and at the time the bill in this case was filed, by William A. Clark, be avoided, with costs in favor of the United States against the said William A. Clark.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

FRED A. MAYNARD,
Special Assistant U. S. Attorney.

HENRY M. HOYT,
Solicitor-General.

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